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No. 10-719

In the

Supreme Court of the United States

DAVID H. SCHEFFER, et al.,

Petitioners,

v.

CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 828, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE, ATLANTIC LEGAL FOUNDATION, AND MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Are attorneys who have been retained by class members automatically disqualified from serving as class counsel under Federal Rule of Civil Procedure 23 if the District Court is of the opinion that the political viewpoint of the public interest organization with whom the attorney is associated is not shared by, or not in the interest of, members of the class?

2. May a District Court assume that an attorney will violate the Rules of Professional Conduct simply because the attorney is employed by a public interest organization?

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IDENTITY AND INTEREST OF AMICI CURIAE

The Center for Constitutional Jurisprudence[1] is dedicated to upholding the principles of the American Founding, including separation of powers and due respect for the proper limit on those powers, including the judicial power. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000).

The Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm that provides legal counsel, without fee, to parents, scientists, educators, and other individuals and trade associations. The Atlantic Legal Foundation's mission is to advance the rule of law in courts and

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Copies of those consents were lodged with the clerk. Amici have also given notice of intent to file this brief to all parties more than 10 days before this brief was filed.

Pursuant to Rule 37.6, Amici Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

before administrative agencies by advocating for limited and efficient government, free enterprise, individual liberty, school choice, and sound science. Atlantic Legal Foundation is guided by a basic but fundamental philosophy: justice prevails only in the presence of reason and in the absence of prejudice. Accordingly, Atlantic Legal Foundation promotes sound thinking in the resolution of legal disputes and the formulation of public policy. *Amicus Curiae's* leadership includes distinguished legal scholars and practitioners from across the legal community. The Foundation's leadership has decades of experience in the practice of corporate and criminal law, as well as the study of legal ethics. Of particular significance here, the Atlantic Legal Foundation has served as counsel for student plaintiffs in a number of cases involving constitutional implications of "compelled speech" through mandatory fees, including *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992); *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985); and *Galda v. Bloustein*, 686 F.2d 159 (3d Cir. 1982);.

The Mackinac Center for Public Policy is a Michigan-based, nonprofit, nonpartisan research and educational institute that advances policies fostering free markets, limited government, personal responsibility and respect for private property. The Center is a 501(c)(3) organization founded in 1988. In 2009, the Center opened the Mackinac Center Legal Foundation and began representing public-interest legal clients.

In pursuing their missions, *amici* employ attorneys or work with volunteer attorneys to represent clients in litigation before the state and

federal courts. In this role, *amici* and their employed and volunteer attorneys are directly affected by the decision of the courts below. By disqualifying attorneys from representing clients in certain types of cases based solely on the political viewpoint of the public interest organization with which the attorneys are associated, the court below presumed a violation of the rules of professional conduct and imposed a content-based restriction on speech. This Court's intervention is required to settle the important and troubling questions raised by the decision below.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

This case raises a critical issue for attorneys employed by or affiliated with a public interest or legal services organization. The court below assumed that merely because an attorney was associated with a public interest organization, the attorney would violate the rules of professional conduct. Using that assumption, the court then proceeded to analyze the political viewpoint of the public interest organization to decide whether, in the court's opinion, that viewpoint would coincide with the views of the members of the class—or whether that viewpoint would be beneficial to the members of the class. The court thus used Rule 23 to decide what viewpoints should be orthodox. The court would never have reached such a point, however, without the unwarranted assumption that attorneys affiliated with public interest organizations would violate the rules of professional conduct. Review by this Court is necessary to determine whether this ideological conformity check will be a necessary step in future Rule 23 proceedings.

I. THE CASE RAISES THE IMPORTANT QUESTION OF WHETHER ATTORNEYS AFFILIATED WITH PUBLIC INTEREST ORGANIZATIONS SHOULD BE PRESUMED TO VIOLATE THE RULES OF PROFESSIONAL CONDUCT

The Circuit Court conflated the attorneys employed by the public interest organization and the organization itself. Public interest organizations, however, are not attorneys and do not practice in the federal courts. These organizations are generally nonprofit corporations and such corporations cannot practice law. Instead, those organizations employ attorneys or affiliate with volunteer attorneys to represent individuals in the courts. Although the public interest organization may be paying for the representation it is not the represented party and the attorney's professional obligations are owed only to the client that is the party to the litigation.

There are cases from the early part of the last century that objected to the model of corporations hiring attorneys to represent third parties (*e.g.*, *In re Cooperative Law Co.*, 198 N.Y. 479, 92 N.E. 15 (1910)). As the California State Bar Standing Committee on Professional Responsibility and Conduct noted, however, those decisions have "not outlasted the evolution of prepaid medical and legal service programs which, under these authorities, would theoretically violate the prohibition against corporations practicing law." Cal. Eth. Op. 1987-91, 1987 WL 109707 at *2.

The California Bar's opinion came in response to the question of whether an insurance company can employ attorneys to represent their insureds. Since

the attorneys would be employees of the insurance corporation, the practice would apparently come within the prohibition outlined in cases such as *In re Cooperative Law*. The Bar, however, recognized that much had changed in the years since those early decisions. The Bar opinion eschewed any bright line distinction that hinged on the employment relationship: "the mere fact that the lawyers are employees of Insurance Company does not necessarily compromise the attorney's independent professional judgment." *Id.* at *3. The opinion further noted that "in absence of a conflict of interest . . . *it cannot be presumed that simply because the attorneys . . . are salaried employees of Insurance Company that they will act unethically or will otherwise sacrifice their professional obligations to the insureds.*" *Id.* at *4 (emphasis added). That assumption, however, is the basis of the lower court's decision in this case.

This California Bar opinion was followed by the recent California Court of Appeal decision in *Gafcon, Inc. v. Ponsor & Associates*, 98 Cal. App. 4th 1388 (2002). That case brought the issue of insurance companies' hiring of staff lawyers from the theoretical basis of the State Bar opinion to the reality of the courtroom. Central to the court's holding was its view that the nature of an attorney's employment did not change his or her ethical obligations. "All lawyers, whether employed by a corporation or by an independent law firm that is retained by a corporate entity, are bound by the same fiduciary and ethical duties to their clients." *Id.* at 1412.

In reaching its holding, the *Gafcon* court reviewed how other state courts had handled this issue and found "that eight of 10 state courts addressing the issue and one federal circuit have concluded it is permissible for an attorney employed by an insurance company to represent the company's insureds." *Id.* at 1413 n.11 (noting findings by the Indiana Supreme Court reviewing the same issue). The court concluded that the employment of staff attorneys by the insurance corporation did not constitute the unauthorized practice of law by the corporation.

As noted above, the early opposition to corporations employing attorneys was based on the fear that the attorney would fail to act in the client's best interest. As one scholar put it:

> The hostility to the corporate practice of law was explained in *In re Co-operative Law Company* [198 N.Y. 479, 92 N.E. 15 (1910)]: The relation of attorney and client . . . cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the directions of the corporation and not to the directions of the client . . . . The corporation would control the litigation, the money earned would belong to the corporation and the attorney would be responsible to the corporation only.

Roy D. Simon, Jr., *Fee Sharing Between Lawyers and Public Interest Groups*, 98 Yale L.J. 1069, 1079 (1989) (footnote omitted). To guard against this danger, a number of rules of professional conduct have been promulgated.

> Even if organizations would like to control their staff attorneys, the rules of legal ethics already provide multiple protections against lay interference with an attorney's independent judgment. For example, [ABA] Rule 1.2(a) requires a lawyer to "abide by a client's decisions concerning the objectives of representation," and more specifically to "abide by a client's decision whether to accept an offer of settlement of a matter." This rule prohibits a lawyer from allowing an organization to control decisions about settlement. In addition, Rule 1.7 prohibits a lawyer from representing a client if the representation "may be materially limited by the lawyer's responsibilities . . . to a third person," such as the organization.

Id. at 1113 (footnotes omitted); *see* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-374 (1993).

New York has adopted these provisions of the model rules. New York Rule of Professional Conduct 1.8(f) prohibits accepting compensation for representing a client from a third party unless "there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship." New York Rule of Professional Conduct 1.7 similarly prohibits representation of a client in situations where it would result in the representation of differing interests. Comment 13 to this rule specifically notes that the rule does not prohibit the lawyer from being paid for the representation "from a source other than the client." *Id.* These rules apply to practice in the United

States District Court for the Western District of New York. Local Rules of Civil Procedure, Rule 83.1.

These rules protect the constitutional right of public interest organizations and other associations to provide the means for the exercise of the right of petition. *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 223 (1967) (quoting *Thomas v. Collins*, 323 U.S. 516, 531 (1945)). Indeed, this Court has held that labor unions can employ staff attorneys for the purpose of providing group legal services to their members—without regard to state regulations prohibiting "corporate" practice. *E.g.*, *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585-86 (1971); *United Mine Workers*, 389 U.S. at 223; *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 5-6 (1964); *see also* Simon, *supra*, at 1128-29 (noting that the Court's review of empirical evidence demonstrated that none of the harms feared from permitting group legal service arrangements had, in fact, come to pass). In the context of federal legislation the Court noted: "A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." *Trainmen*, 377 U.S. at 7. This point is no longer open to question. As the American Bar Association has noted: "While it is unnecessary to our conclusion under the ethics rules, we note that it is now well settled, as a matter of constitutional law, that non-profit organizations may employ staff attorneys to provide legal representation to appropriate

categories of third persons." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-374.

The decision of the court below, however, resurrects these ancient objections to organizations paying for the representation of third parties. It is now well-settled that states may not "infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." *Trainmen*, 377 U.S. at 7. The question raised by the decision below is whether the Federal Rules of Civil Procedure may infringe on such rights. This is a question of critical importance for practice in the federal courts.

II. THE COURT SHOULD RESOLVE THE QUESTION OF WHETHER RULE 23 REQUIRES OR EVEN PERMITS A CONTENT-BASED ANALYSIS OF THE SPEECH OF THE PUBLIC INTEREST ORGANIZATION WITH WHOM PROPOSED CLASS COUNSEL IS ASSOCIATED

Having presumed that the attorneys for petitioner would violate the New York Rules of Professional Conduct regarding third party interference with the representation, the court below proceeded to analyze whether that presumed interference would result in a prohibited conflict. In making this determination, the court did not look to economic conflicts. Instead it analyzed the political positions of the public interest organization paying for the representation and then made a determination as to whether those positions might be in the best interests of the members of the proposed class. Interpreting Rule 23 to permit such an

analysis will necessarily require federal district courts to disrupt relationships that this Court has determined are protected by the First Amendment and will further require those courts to determine what political viewpoints are appropriately orthodox in particular class action litigation.

There is no question that the First Amendment protects employment of lawyers as staff attorneys for an organization not licensed to practice law for the purpose of representing third parties. The *NAACP v. Button*, 371 U.S. 415 (1963), line of cases recognize a First Amendment right to use litigation to secure civil rights. *The Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964), line of cases recognize a First Amendment right to associate for a common purpose that includes a right for unions to employ attorneys for the purpose of providing legal representation to union members. Under either theory, the Federal Rules of Civil Procedure ought not to be interpreted in a manner that might inhibit exercise of the freedom of speech and association rights at issue in the absence of a compelling governmental purpose.

Further, it is by now well established that a public interest organization's pursuit of litigation as a means of affecting public policy is a mode of expression protected by the First Amendment. As this Court noted with regard to the NAACP more than 40 years ago: "In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government . . . . It is thus a form of political expression." *NAACP v. Button*, 371 U.S. at 429.

Thus, the practice is protected by the First Amendment. *Id.* at 429-30; *In re New Hampshire Disabilities Rights Center, Inc.*, 130 N.H. 328, 336, 541 A.2d 208, 213 (N.H. 1988). State regulations that interfere with the right must give way unless supported by a compelling interest. *In re New Hampshire Disabilities Rights Center, Inc.*, 130 N.H. at 336, 541 A.2d at 213; Simon, *supra*, at 1126. As then New Hampshire Supreme Court Justice Souter noted:

> Organizations, their members and their staff lawyers may assert a protected first amendment right of associating for noncommercial purposes to advocate the enforcement of legal and constitutional rights of those members, or of others within a definite class whom the organization exists to serve. When such advocacy may reasonably include the provision of legal advice or take the form of litigation, the organization may itself provide legal representation to its members or beneficiaries despite State regulations restricting legal practice and the solicitation of clients, provided that the organization and its lawyers do not engage in the specific evils that the general State regulations are intended to prevent.

In re New Hampshire Disabilities Rights Center, Inc., 130 N.H. at 336, 541 A.2d at 213.

The presumption that the public interest organization's political viewpoint may interfere with the representation has already been rejected by this Court as a justification for state regulations that

interfere with First Amendment rights to pursue litigation as a mode of expression. *NAACP*, 371 U.S. at 438-39. Indeed, the Court in *NAACP* specifically rejected the fear that nonlawyers would seek to interfere in the representation as a basis for the regulation. *Id.* at 441. Yet that very fear was the basis of the lower court's ruling in this case.

If public interest organizations have a constitutional right to provide attorneys to third parties as a means of political expression, requiring the federal district courts to determine whether the viewpoints of the organization are consonant with the presumed view points of class members invites suppression of those rights. Review by this Court is necessary to ensure that federal judges are not required or permitted to inquire into the political viewpoints of class members in making decisions under Rule 23.

CONCLUSION

The decision of the court below promises to entangle the federal district courts in a thicket of constitutional problems that must result in the suppression of speech and association protected by the First Amendment. Review by this Court is necessary to avoid these problems and to reaffirm the principal that as officers of the Court, attorneys can be presumed to adhere to the rules of professional conduct.

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Respectfully submitted,

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